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EX PARTE

William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115

Dear Mr. Caton:

MCI Telecommunications Corporation (MCI) submits this letter in response to various recent filings by US West and to bring to the Commission's attention a practice of Bell Atlantic that illustrates the urgency of a strict application of the restrictions in Section 222 of the Communications Act, as amended by the Telecommunications Act of 1996.

US West filed a letter in this docket on August 13, 1997, attaching a Bell Operating Company (BOC) coalition presentation on the alleged costs and burdens of implementing customer proprietary network information (CPNI) database safeguards under various regulatory scenarios (BOC Coalition presentation).[1] It filed a letter on September 9 rehashing its previously stated views as to the nature of customer approval required for the use or disclosure of CPNI under Section 222(c)(1) and adding a discussion of a market trial that supposedly demonstrates the impracticality of securing affirmative oral approval for such use (US West letter).[2] It followed up with another letter the next day attaching a reply by Professor Laurence Tribe to Bruce Ennis'

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1 See letter from Elridge A. Stafford, US West, to William F. Caton, Acting Secretary, FCC, dated August 13, 1997 and attachment, "Technical, Operational, and Customer Impacts of Five Telecommunications Service Category Scenarios: A Coalition Analysis."

2 See letter from Kathryn Marie Krause, US West, to Dorothy T. Attwood, FCC, dated September 9, 1997, attached to cover letter from Kathryn Marie Krause to William F. Caton, FCC, dated September 9, 1997.

response to Professor Tribe's earlier discussion of the First Amendment implications of a requirement of affirmative customer approval under Section 222(c)(1) (Tribe reply).[3] After addressing these three items, MCI will turn to Bell Atlantic's recent misuse of proprietary information.

BOC Coalition CPNI Database Presentation

The August 13 presentation relies on various incorrect or irrelevant assumptions about customers' desires and expectations that MCI has discussed previously. As MCI has explained in its Further Comments in this docket, filed on March 17, 1997, the survey that supposedly supports the BOCs' assertion that customers expect their own carriers to use all of their account record information was biased and designed to avoid learning anything about the consumer attitudes that are the most relevant to these issues.[4] Moreover, the conclusions the BOCs draw from the survey fail to take into account the competitive goals of Section 222. See MCI Further Comments at 4-9.

More fundamentally, the estimated costs and other burdens of each of the regulatory "scenarios" assessed in the presentation have been exaggerated by an unnecessary assumption, namely, that customer record database systems would have to be developed to override access restrictions on CPNI. It is not actually necessary, however, to develop such an "override" system. As MCI explained in the attachment to its ex parte filing dated August 15, 1997, at pages 8-12, in those situations where personnel ought to have access to a customer's entire record, such as multi-purpose customer service representatives, "use" restrictions should be sufficient -- i.e., such customer service representatives should have access to all CPNI but be instructed not to use it to market services in another category without customer approval.[5] If such personnel obtain such approval, they

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3 See letter from Laurence H. Tribe to Richard A. Metzger, et al., FCC, dated September 10, 1997, attached to cover letter from Kathryn Marie Krause, US West, to William F. Caton, FCC, dated September 10, 1997.

4 This consumer opinion survey, not to be confused with the market test conducted by US West and discussed in its September 9 ex parte, was attached to an ex parte filed by Pacific Telesis on December 11, 1996.

5 See letter from Frank W. Krogh, MCI, to William F. Caton, FCC, dated August 15, 1997, with attachment, "Response to Commission Staff Questions Re: CC Docket No. 96-115."

can use the CPNI they are viewing.

In some situations, however, carrier personnel should not have any access to CPNI in a particular service category -- i.e., marketing representatives selling only services in the other category. In the rare instance where such representatives find it necessary, and are able, to obtain customer approval to use the CPNI to which they do not have access, they can hand off such calls to representatives that do have access to such CPNI. Such a system would avoid the need for the override capability that appears to be the BOCs' primary objection to the development of CPNI database safeguards.[6]

Moreover, the costs and other burdens they cite, even if such an override capability were necessary, are overstated and, even as overstated, are relatively modest. They assert that creating a new database access system with an override capability could cost more than $100 million for each carrier and take five years to implement. It turns out, however, that this estimate assumes a regulatory regime in which each service is treated separately under Section 222 (see Scenario 1 in the BOC Coalition presentation). Assuming the regime that MCI and other parties have advocated, where there are essentially two service categories, with intraLATA toll and wireless treated as "floating" categories, the cost drops to $16.5 million and takes three years to implement (see Scenario 4 in the BOC Coalition presentation).

In fact, it could be done in significantly less time -- approximately three to six months -- without significantly greater expenditure, based on MCI's database systems development experience. An expenditure of several million dollars for an undertaking of this nature is appropriate and manageable, especially for entities of the size and scope of the BOCs and AT&T. For smaller carriers, the cost would be substantially less, given the smaller databases involved, and even an expenditure in the several million dollar range would not impose a significant burden on small carriers. The BOC Coalition presentation thus presents no obstacle to the type of CPNI database safeguard regime suggested by MCI.

CPNI Affirmative Approval Market Test

Since Professor Tribe's reply to Mr. Ennis' letter relies in

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6 MCI also explained in its August 15 ex parte the circumstances in which CPNI use restrictions and access restrictions are appropriate for the BOCs and other carriers.

part on US West's account of its CPNI affirmative approval market test, MCI will address the latter before turning to the Tribe reply. Essentially, US West finds that "Affirmative Customer Consent Cannot Be Secured Regarding CPNI."[7] According to US West, it is just too difficult and expensive to secure affirmative oral approval from customers for the use or disclosure of their CPNI. It argues that the positive response rate of 29% on outbound calls and 72% on the small fraction of the total customer base making inbound calls, especially in light of the cost of securing such approval, means that it would be essentially denied access to most of its customers' CPNI. It concludes that a requirement of affirmative customer approval under Section 222(c)(1) would be contrary to the public interest and would be a barrier to commerce and speech, since it would prevent customers from hearing about services and would prevent US West from using its business information.

In fact, US West's market test results prove, if anything, the opposite. Based on MCI's experience and knowledge of telemarketing generally, a 29% positive response rate on outbound calling to a carrier's customer base is fairly successful. Moreover, as US West points out, much of the negative response is accounted for by customers who do not want to receive any telemarketing at all,[8] which has two extremely important ramifications. First, the negative response therefore cannot be attributed to the inherent difficulty of obtaining affirmative approval, as opposed to the inherent difficulty of telemarketing generally. US West's response rate thus does not demonstrate that an affirmative approval requirement is unreasonable in any way. Second, the nature of the negative response shows that an affirmative approval requirement would not have a significant impact on US West's telemarketing activities, since such a large portion of the customers not giving their approval would not want to receive subsequent telemarketing calls based on their CPNI in any event. In other words, US West's own analysis shows that even with the "opt-out" procedure it advocates, it would not have much better luck telemarketing to those customers.

Thus, US West has merely demonstrated that telemarketing in a competitive environment is going to be difficult and costly for it, which MCI could have told US West before it went through the process of discovering the obvious with its market test. Congress intended to restrict the use of CPNI for both privacy and competitive reasons, and US West has simply confirmed that Congress succeeded in carrying out that intent. An opt-out

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7 US West letter at 8.

8 See id. at 10-11 & n.39, 13, 15.

procedure, on the other hand, would not carry out that intent, nor would it conform to the terms of Section 222(c)(1), as MCI has explained in its previous filings in this proceeding.[9] Moreover, an affirmative approval requirement would not prevent US West from telemarketing to its customers or otherwise block speech or commerce. MCI's advice to US West is simply to try harder, rather than asking the Commission to do away with the restrictions in Section 222(c)(1).

Tribe Reply

For the most part, Professor Tribe's reply to the Ennis letter does not break new constitutional ground and primarily relies on misstatements of MCI's positions or repetition of Professor Tribe's earlier letter. His laundry list of First Amendment cases establishing that, e.g., nude dancing is constitutionally protected expression[10] hardly comes to grips with Mr. Ennis' letter.

Professor Tribe argues that the intracorporate sharing and use of CPNI is entitled to full, undiluted First Amendment protection. As Mr. Ennis pointed out, however, restrictions on the use of CPNI do not prevent US West from engaging in protected speech regarding its business or its services. Interpreting Section 222(c)(1) to require affirmative customer approval for the use or disclosure of CPNI would not prevent US West from telemarketing in any way. In fact, the sharing and use of CPNI internally does not impact speech at all. Professor Tribe does not mention cases such as Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), cited by Mr. Ennis, stating that "`it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed.'" Id. at 456 (quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). Ohralik cites examples of regulation of business activity similar to restrictions on CPNI that do not offend the First Amendment. Indeed, "employers' threats of retaliation for the labor activities of employees" are the type of internal communication that Professor Tribe insists is always accorded full First Amendment protection, but Ohralik points out that such

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9 See, e.g., MCI Further Comments at 4-10.

10 Citing Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991).

communications have no such protection. 436 U.S. at 456.[11]

Mr. Ennis also explained that even assuming that the sharing and use of CPNI somehow implicates First Amendment values, it would only be accorded the intermediate scrutiny applicable to commercial speech under cases such as Central Hudson Gas & Electric v. Public Serv. Comm'n, 447 U.S. 557 (1980), another case that Professor Tribe fails to address.[12] Restrictions on commercial speech will be upheld if the government asserts a substantial interest in support of the regulation, the regulation advances that interest, and the regulation is narrowly drawn. Id. at 557. Here, Section 222 advances both privacy and competitive interests, and an affirmative approval requirement would advance those interests and is a narrowly drawn method for doing so. Professor Tribe cites US West's recent market survey as proof that even an oral affirmative approval requirement is too burdensome to pass muster under this test, but, in fact, as discussed above, a positive response rate of almost 30% to any outbound calling campaign is a success and hardly demonstrates that an affirmative approval requirement is unreasonable.

Professor Tribe tries to confuse the analysis by asserting that an opt-out procedure would also accommodate privacy goals, but that is both incorrect, for reasons already explained in MCI's previous pleadings in this docket, and irrelevant. If an affirmative customer approval requirement would advance such goals and is narrowly drawn, it passes constitutional muster, whether or not another procedure might also do so. More

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11 Professor Tribe dismisses the examples of regulation cited in Ohralik as "forms of speech that are themselves instruments of crimes or wrongful conduct," asserting that "[t]he substance of the communication at issue here is not itself illegal and no one suggests otherwise." Tribe reply at 4 n.3. That assertion begs the question, of course, since that is exactly what MCI is suggesting -- i.e., that the use of CPNI to market another category of service without affirmative customer approval is, in fact, illegal under Section 222(c)(1). Professor Tribe's ipse dixit does not explain why such an interpretation of Section 222 would be unconstitutional.

12 To the extent Givhan v. Western Line Consolidated School Dist., 439 U.S. 415 (1979), involved private communications, a First Amendment balancing test was applied to the speech at issue there only because it involved matters of public concern. Nothing in Givhan suggests that the purely private information US West wants to use here for purely commercial purposes would receive anything more than the limited protection accorded commercial speech, if that.

significant than Professor Tribe's defense of an opt-out procedure is what he does not say here -- namely, that affirmative customer approval would not advance privacy goals. The implicit admission that affirmative approval would advance such goals is fatal to Professor Tribe's case.

Professor Tribe dismisses Mr. Ennis' assertion of Section 222's competitive goals as unsupported by any citation to legal authority, but such authority was set forth at pages 5-6 of MCI's Further Comments. As MCI explained, Congress in fact intended to restrict the use of CPNI to facilitate the development of competition as well as to protect customers' privacy. Again, it is irrelevant that the Commission has found the use of CPNI to be pro-competitive in other contexts prior to the enactment of Section 222. Congress intended in passing Section 222 to restrict the use of CPNI for competitive reasons, and that intent would be advanced by a requirement of affirmative approval for such use.

Professor Tribe tries to construct an argument that an affirmative customer response requirement would not advance competitive goals. He states, at page 5, that long distance carriers have substantial CPNI in their possession, but, under Mr. Ennis' view, "they would have no reciprocal obligation to provide customer information to BOCs absent affirmative customer request." It is not clear what reciprocity he is talking about. Section 222 covers all carriers equally, as MCI has explained in its prior comments. Thus, long distance carriers must obtain affirmative approval from their customers before using their CPNI to market another category of service to them, just as BOCs must do. Moreover, as explained in MCI's Further Comments, at 5-7, Section 222 covers carriers' use of CPNI that is already in their possession as well as disclosure of CPNI to other carriers. To the extent that Professor Tribe is attacking the nondiscrimination requirements of Section 272, which apply only to the BOCs and which were found, in another proceeding, to apply to CPNI,[13] those requirements were necessitated by the BOCs' monopoly control of local services.[14] As pointed out in Mr.

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13 First Report and Order and Further Notice of Proposed Rulemaking at ¶ 222, Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket No. 96-149, FCC 96-489 (released Dec. 24, 1996), petitions for recon. pending, pet. for review pending sub nom. SBC Communications v. FCC, No. 97-1118 (D.C. Cir. filed Mar. 6, 1997), Order on Reconsideration, FCC 97-52 (released Feb. 19, 1997), Second Order on Reconsideration, FCC 97-222 (released June 24, 1997).

14 Id. at ¶¶ 9-13.

Ennis' letter, "the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment." Turner Broad. Sys., Inc. v. FCC, 115 S.Ct. 2445, 2470 (1994).

Professor Tribe goes on to assert that if BOCs are forced to divulge to long distance providers any CPNI they wish to share internally, such a rule would run afoul of Section 222's privacy goals. As Mr. Ennis explained, however, that assertion depends on a series of assumptions about customers' privacy expectations which have not been proven and were not shared by Congress when it passed Section 222.[15] Professor Tribe also has not explained why Congress' balancing of privacy and competitive interests in Sections 222 and 272 necessarily offends the First Amendment. See Turner Broad. Sys. Inc. v. FCC, 117 S.Ct. 1174, 1189 (1997)(in assessing the constitutionality of a statute, courts must show deference to Congress' judgments). Moreover, as Mr. Ennis also explained, there are other possible interpretations of Section 222 and 272 than the choice posited by Professor Tribe. As MCI explained in its Further Comments, at 11-12, the Commission, in applying Section 222 and 272, could require a carrier to disclose CPNI to a third party demonstrating the requisite customer affirmative approval if the carrier uses CPNI, or discloses CPNI to its own affiliate, with such approval. Under such a regime, the customer would retain equal control over disclosure of CPNI to all parties. In any event, none of these possible approaches to the interpretation of Sections 222 and 272 would violate the First Amendment.

Bell Atlantic's Misuse of Carrier Propietary Information

Recently, Leonard Sawicki, an MCI employee and long distance service subscriber who lives in Virginia and is also a Bell Atlantic local exchange service subscriber, called Bell Atlantic to cancel his "Easy Voice" service.[16] During the call, the Bell Atlantic representative tried to sell Mr. Sawicki three-way calling as a way to reduce his long distance bills. The Bell Atlantic representative made it clear that she was perusing his MCI calling records during the call. She computed how much he spent on long distance calls and commented on the number of short duration calls. At no time did the Bell Atlantic representative

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15 See MCI's Further Comments at 5-6.

16 Using this voice-activated service, a subscriber can speak a name into the receiver, causing a pre-set number to be dialed automatically.

request permission to review or use Mr. Sawicki's long distance calling records for marketing purposes.

This practice clearly violates Section 222 in a number of ways. Bell Atlantic only has access to subscribers' long distance calling records in its capacity as billing agent for the long distance carriers. Sections 222(a) and (b) state:

> (a) IN GENERAL. — Every telecommunications carrier has a duty to protect the confidentiality of proprietary information of, and relating to, other telecommunication carriers, ... and customers ....
>
> (b) CONFIDENTIALITY OF CARRIER INFORMATION. — A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

First, Bell Atlantic has violated Section 222(a), since it failed to protect MCI's proprietary information that it received for billing purposes.[17] Moreover, although billing and collection is not a "telecommunications service," the provision of long distance service certainly is, and, in this case, Bell Atlantic is receiving proprietary information from MCI "for purposes of" furthering MCI's provision of such service. Bell Atlantic's use of such information for its marketing efforts thus violated Section 222(b).

Finally, since calling record data also constitutes CPNI, Bell Atlantic's use of such data for marketing purposes without customer approval also violated Section 222(c)(1) of the Act. Such brazen violations demonstrate the need for the immediate promulgation of strict rules implementing Section 222 and prompt enforcement of such rules. This incident also shows how important intrusive auditing of Section 222 compliance will be, since most violations of Section 222 will not be nearly as open as this was.

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17 See AT&T Communications of California, et al. v. Pacific Bell, et al., No. C 96-1691 SBA (N.D. Cal. July 3, 1996), slip op. at 10-13 (granting preliminary injunction), aff'd, No. 96-16476 (9th Cir. Mar. 14, 1997).

MCI appreciates the opportunity to respond to the recent US West filings and to bring to the Commission's attention Bell Atlantic's recent violation of Section 222. Any questions about these matters may be directed to the undersigned.

Yours truly,

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